

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB MARCH 7, 00

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Woodgrain Millwork, Inc.

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Serial No. 75/273,340

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Albert P. Barker of Hawley Troxell Ennis & Hawley LLP  
for Woodgrain Millwork, Inc.

Allison S. Berman, Trademark Examining Attorney, Law Office  
104 (Sidney Moskowitz, Managing Attorney)

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Before Cissel, Walters and Rogers, Administrative Trademark  
Judges.

Opinion by Rogers, Administrative Trademark Judge:

Woodgrain Millwork, Inc. has filed an application to  
register the mark LEGEND for "non-metal PVC window frames;  
non-metal windows; plastic windows; wood windows."<sup>1</sup>

The Trademark Examining Attorney made a final refusal  
of registration under Section 2(d) of the Trademark Act, 15  
U.S.C. 1052(d), on the ground that the mark LEGEND has

already been registered for "aluminum doors and windows,"<sup>2</sup> in international class 6, so that, when applicant's identical mark is used on its identified goods, it would be likely to cause confusion or mistake, or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the similarities of the marks and the relatedness of the goods, their channels of trade, and their consumers. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

As applicant concedes, the involved marks are identical in sight and sound. Further, there is no evidence that they differ in meaning or connotation when considered in connection with the respective identified

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<sup>1</sup> Serial No. 75/273,340, in International Class 19, filed April 11, 1997, claiming a bona fide intention to use the mark in commerce.

goods. The identical nature of the marks is a fact which "weighs heavily against applicant." *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Applicant argues that LEGEND is laudatory, commonly used in marks, and therefore weak and entitled to a narrow scope of protection. Applicant's argument is unpersuasive as applicant has provided no evidence of any third-party use or registration of the mark for any goods or services.<sup>3</sup> Moreover, even weakness of a mark will not necessarily avoid a finding of likelihood of confusion. *See In re Copytele Inc.*, 31 USPQ2d 1540, 1542 (TTAB 1994) (weakness of cited mark "overbalanced by the virtual identity of the applicant's and the cited registrant's goods and the substantial similarity in the overall appearance of their marks").

We turn, then, to an assessment of the relatedness of the goods, their channels of trade, and their consumers. Applicant argues, without any evidentiary support, that registrant's goods are inexpensive and that applicant's goods are of higher quality and higher price, and travel in

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<sup>2</sup> Registration No. 2,039,307, issued February 18, 1997, to Cuprum, S.A. de C.V.

<sup>3</sup> For an applicant to rely on third-party registrations, copies must be made of record. *See, e.g., In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983).

different channels of trade.<sup>4</sup> The Examining Attorney has made of record numerous third party registrations that show that the types of goods sold by both applicant and registrant can come from the same source.

The Board has stated that "[i]f the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion." *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). The likelihood of confusion analysis, in regard to the relatedness of applicant's and registrant's goods, must be determined on the basis of the goods as they are identified in the respective application and registration. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Since neither identification is restricted in any way as to channels of trade or classes of consumers, despite applicant's allegations to the contrary, the Board must assume that the goods could be offered through all normal channels of trade and to the same classes of

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<sup>4</sup> Applicant notes that its mark is now in use in commerce and asserts that its goods are distributed in a geographically distinct area from the goods of registrant. The application, however, is based on intent to use, does not contain any evidence of applicant's use of its mark, and is not geographically

consumers. *Id.* Moreover, in the absence of any evidence from applicant to support its argument that the involved goods move in different channels of trade, we agree with the Examining Attorney's conclusion that they travel in the same channels of trade, because the goods are functionally equivalent and interchangeable and differ only in material composition.

The third-party registrations submitted by the Examining Attorney have probative value to the extent that they suggest that the goods involved in this appeal are of a type that may emanate from a single source under the same mark. *In re Albert Trostel & Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). Applicant argues that in view of these registrations, showing that some manufacturers produce both metal windows in class 6 and non-metal windows in class 19, the cited registrant must have made a conscious decision to limit its business to production and marketing of metal windows. In contrast, applicant asserts that it has restricted itself to non-metal windows. Thus, applicant concludes, the fact that the respective goods are in different classes is a relevant factor that can support a finding of no likelihood of confusion. We disagree, and

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restricted so as to seek a concurrent use registration. Thus, these arguments are not relevant.

find that the marketing of the respective goods under identical marks would lead consumers to believe that the goods are merely different product lines from a common source or sponsor.

Finally, applicant's argument that there have been no instances of actual confusion in the approximately one year since applicant began using its mark is unavailing. Such an assertion is of limited value, in view of the short period of contemporaneous use and the absence of evidence on the nature and extent of applicant's use. *Cooper Industries, Inc. v. Repcoparts USA Inc.*, 218 USPQ 81, 85-86 (TTAB 1983).

Decision: The refusal under Section 2(d) of the Act is affirmed.

R. F. Cissel

C. E. Walters

G. F. Rogers

Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board